JUN 27 1958
JOHN T. FEY, Clerk
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 133

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS J. PEARSON,
927 15th Street N.W.,
Washington, D.C.,
Attorney for Petitioners.

The Scheffer Press, Inc., 118 S. Clinton Street, Chicago 6, Illinois

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented for Review	2
Statute Involved	2
Statement of the Case	3
Argument on Reasons for Granting the Writ	3
Conclusion	5

CITATIONS.

Federal Trade Commission v. Bunte Bros., Inc., 312 U. S. 349 (1941) 2, 3, 4

Zitserman v. Federal Trade Commission, 200 F. 2nd 523 4

STATUTE.

Federal Trade Commission Act, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed.) 2, 1a

INDEX TO APPENDIX

	PAGE
Federal Trade Commission Act, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed.)	1a
Proceedings in Circuit Court	
(a) Final decree	5a
(a) Opinion	2a
(c) Order denying petition for rehearing	5a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1958.

No.

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your petitioners R. B. James and Patrick Zurla, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 7, 1958, affirming an order issued by the Federal Trade Commission.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 253 Fed. (2) 78 (App. 2a).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 7, 1958 (App. 2a), petition for rehearing denied March 31, 1958 (App. 5a), and final order entered on the 7th day of April, 1958 (App. 5a).

The Jurisdiction of this Court is invoked under Section 5 (c) of the Federal Trade Commission Act, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed), which provides, "The judgment and decree of the (Circuit) court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code" (App. 1a).

QUESTION PRESENTED FOR REVIEW.

The decision in this case is contrary to and in direct conflict with this Court's decision in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349.

STATUTE INVOLVED.

The statute which is involved is the Federal Trade Commission Act 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed).

STATEMENT OF THE CASE.

Petitioners sell punchboards and push cards in interstate commerce to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

The complaint does not allege that the intrastate use of punchboards to distribute merchandise is a violation of the F.T.C. Act nor is there an allegation that the shipping of punchboards which are used exclusively in intrastate commerce is a violation of the said statute.

The order of the Federal Trade Commission is as follows, to wit:

> It is ordered that the respondents do forthwith cease and desist from:
>
> Selling or distributing in commerce as commerce is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

ARGUMENT ON REASONS FOR GRANTING THE WRIT.

Petitioners' point is that the decision in the case at bar by the United States Circuit Court of Appeals is contrary to and in direct conflict with this Court's holding in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349.

The Circuit Court in its opinion in the case at bar says:

> "*Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941) and *U. S.* v. *Perry Halseth*, 342 U.S. 277 (1952) are the two chief, and inapposite, opinions forming the core of petitioners brief. We agree with views of Chief Judge Gardner reported in *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 523 (8th Cir. 1952)."

The *Zitserman* case is in direct conflict with the *Bunte* case, therefore, the case at bar is in conflict with the *Bunte* case.

This Court in the case of *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, held that the intrastate use of punchboards, that is the use of chance, to distribute merchandise is not a violation of the Federal Trade Commission Act. While on the other hand, *in direct conflict with the holding in the Bunte case*, the case of *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, held that the use of punchboards, that is the use of chance, to distribute merchandise is a violation of the Federal Trade Commission Act. The truth and accuracy of the above statement cannot be questioned. Just a casual reading of the two above cited cases will establish beyond doubt that the *Zitserman* case is in direct conflict with the *Bunte* case, as we said above, "therefore, the case at bar is in conflict with the *Bunte* case".

CONCLUSION.

Wherefore, Petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

THOMAS J. PEARSON
Attorney for Petitioners.

APPENDIX.

PERTINENT TEXT OF THE FEDERAL TRADE COMMISSION ACT, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed.).

"Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago 10, Illinois

Order entered Friday, February 7, 1958.

Before: J. EARL MAJOR, PHILIP J. FINNEGAN, and ELMER J. SCHNACKENBERG, *Circuit Judge*

(Title of Cause.)

This cause came to be heard on the petition for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the cease and desist order of the Federal Trade Commission entered therein on June 12,

1957, be AFFIRMED and judgment entered by this Court enforcing it in accordance with the provisions of 15 U.S.C. § 45 (c), pursuant to the opinion of this Court filed this day.

OPINION.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12106. SEPTEMBER TERM, 1957 JANUARY SESSION, 1958.

R. B. JAMES, and PATRICK ZURLA, Individuals and Co-partners, Trading as CHICAGO BOARD COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Review and Set Aside An Order of the Federal Trade Commission.

February 7, 1958.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Section 5(a)(1) of the Federal Trade Commission Act in relevant part[1] provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The co-partner petitioners have brought here for review a cease and desist order[2] issued against them by the Commission acting under § 5(a)(1) based upon undisputed facts showing the following. For

[1] 66 Stat. 632; 15 U. S. C. § 45(a) (1952 ed).

[2] Petitioners are restrained from "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be and in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

two years these petitioners engaged in the sale and distribution in commerce, within the statutory meaning of that word, of pushcards and punchboards, for use by retail dealers when selling merchandise to the public. These pushcards and punchboards are designed and arranged for use in games of chance, gift enterprises or lottery schemes by retailers when selling and distributing merchandise to the buying public. Petitioners' sales in 1954 and 1955 amounted to roughly $500,000 annually, and their pushcards and punchboards are transported from their Illinois place of business to purchasers in various parts of the United States and the District of Columbia. Other significant factual aspects of this situation are adequately summarized in the Commission's opinion:

> "Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance. Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sales and distribution of merchandise.

"Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public."

Overlooking, when not denying, Congressionally authorized Commission functions and aims, these petitioners, in substance, claim an unrestricted right to use interstate commerce channels for flooding the states with punchboards. Because petitioners themselves do not participate in the ultimate sales of punches over store counters to individual consumers within a state, petitioners ask for immunization from § 5(a)(1). To describe their position posits the refutation of it. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483 (1922).

The parties' stipulations entered of record during Commission hearings on the complaint sufficiently supports the findings made by the Agency. *Federal Trade Commission* v. *Bunte Brose, Inc.*, 312 U. S. 349 (1941) and *U. S.* v. *Perry Halseth*,[3] 342 U. S. 277 (1952) are the two chief, and inapposite, opinions forming the core of petitioners' brief. We agree with views of Chief Judge Gardner reported in *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 523 (8th Cir. 1952). See also the opinion of Chief

[3] An order entered by a panel of judges of our court September 5, 1954 affirmed the Commission's order in *Perry Halseth* v. *Federal Trade Commission*, No. 11022. There, petitioner's brief cited and heavily relied on *United States* v. *Halseth*, 342 U. S. 277 (1952). For some reason petitioners, in our court, persistently insist that the Supreme Court's decision under 18 U. S. C. § 1301 has bearing on a Federal Trade Commission proceeding. Obviously such reliance, by petitioners on review, is misplaced. See *e. g. Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607, 611 (9th Cir. 1952).

Judge Phillips reported as *Gay Games* v. *Federal Trade Commission*, 204 F. 2d 197 (10th Cir. 1953) and *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (9th Cir. 1953). The last three cited cases involve punchboards and the tenuous questions under review in this appeal. There will be no conflict between those three circuits and ours in this matter.

The cease and desist order of the Commission is affirmed and judgment entered by this court enforcing it in accordance with the provisions of 15 U. S. C. § 45(c).

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

Chicago 10, Illinois

Order entered Monday, March 31, 1958

Before: J. EARL MAJOR, PHILIP J. FINNEGAN, and ELMER J. SCHNACKENBERG, *Circuit Judge*

(Title of Cause.)

It is ordered by this Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

R. B. JAMES, and PATRICK ZURLA, Individuals and Co-partners, Trading as CHICAGO BOARD COMPANY, *Petitioners,* v. FEDERAL TRADE COMMISSION, *Respondent.*	No. 12,106

FINAL DECREE COMMANDING OBEDIENCE TO ORDER TO CEASE AND DESIST

Petitioners herein, having filed in this Court on August 9, 1957, a petition to review and set aside an order issued

against them on June 12, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of R. B. James, and Patrick Zurla, Individuals and Co-partners, trading as Chicago Board Company, Docket No. 6482"; and a copy of said petition having been served upon respondent; and respondent thereafter having certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 13, 1958; and this Court having thereafter fully considered the cause and having rendered its decision on February 7, 1958, affirming and entering its judgment enforcing said order:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the aforesaid petition be, and it hereby is, dismissed, and that petitioners be, and they hereby are, commanded to obey the aforesaid order to cease and desist, as heretofore affirmed and enforced, and to comply therewith; and

It Is Hereby Further Ordered, Adjudged and Decreed that within ninety days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, heretofore affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause

to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

/s/ PHILIP J. FINNEGAN
U. S. Circuit Judge

/s/ ELMER J. SCHNACKENBERG
U. S. Circuit Judge

Dated: Apr 7 1958

A True Copy:

Teste:

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

CERTIFICATE OF THE CLERK

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of Brief and Argument for the Petitioners and Appendix, Filed October 16, 1957, Opinion Filed February 7, 1958, Judgment, Entered February 7, 1958, Petition for Rehearing Denied March 31, 1958, and Final Decree, Entered April 7, 1958, in

Cause No. 12106

R. B. James & Patrick Zurla, etc., et al.,

vs.

Federal Trade Commission

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this Nineteenth day of June A. D. 1958.

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit

(Seal)

No. 133

JUN 27 1938
JOHN T. FEY, Clerk

In the United States Court of Appeals For the Seventh Circuit

No. 12106.

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On petition to review and set aside an order of the Federal Trade Commission.

BRIEF AND ARGUMENT FOR PETITIONERS AND APPENDIX.

MARVIN H. RUTTENBERG
33 No. LaSalle Street
Chicago, Illinois
Attorney for Petitioners.

U. S. C. A. 7
FILED
J.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Statement of Facts	1
Summary of Argument	2
Contested Issue	3
Propositions of Law Relied Upon	4
Argument	5

Authorities Cited.

Building Service Employees International Union Local 262 et al. v. Gazzam 339	10
Carter v. Carter Coal Co., 298 U. S. 238	13
Erie Railroad Co. v. Tompkins, 304 U. S. 64	11
Feitler v. F. T. C., 201 F. 2d 790	6
Julien v. Model Building Loan & Investment Co., 92 N.W. 561, 116 Wis. 79, 61 L.R.A. 668	9
Keller v. U. S., 213 U. S. 138	9, 12
J. C. Martin Corp. et al. v. F.T.C.	6
F.T.C. v. Bunte Bros., Inc., 312 U. S. 349	3, 4, 7
F.T.C. v. Raladam, 283 U. S. 643	5
U. S. v. Perry Halseth, 342 U. S. 277	3, 4, 8, 14
U. S. Vassar, 72 U. S. 462	13

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12106

R. B. JAMES and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,
Petitioners,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

On petition to review and set aside an order of the Federal Trade Commission.

BRIEF AND ARGUMENT FOR PETITIONERS AND APPENDIX.

STATEMENT OF FACTS.

This proceeding is brought under Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 5 to issue a cease and desist order to restrain the petitioners from shipping punchboards in interstate commerce to persons and firms who use said devices to distribute merchandise in intrastate transactions. The Trial Examiner after hearings made his findings of fact and issued a cease and desist order (a. 4). The Commission on appeal from the Trial Examiner's ruling adopted the Examiner's find-

ings and order (a. 7-14). The petitioner herein is asking this Court to set aside this order.

The errors relied on arise out of the Commission's failure to make sufficient findings of fact to support the order.

The Commission found that the petitioners ship punchboards in interstate commerce to other persons, firms, and corporations who use some of the said devices to conduct lotteries or games of chance in the distribution of merchandise (a. 6).

SUMMARY OF ARGUMENT.

Petitioners in their argument point out first that the authorities relied upon by the Commission in its opinion (a. 7) are not in point or controlling herein because the findings of fact in the case at bar are substantially different from the findings in the cited cases.

The Commission does not claim to have jurisdiction over the interstate shipment of gambling or lotteries devices. Its contention is that its authority in this field is limited to the interstate shipping of punchboards which are used in intrastate transactions to distribute merchandise. The Commission makes this contention on the grounds that the intrastate use of punchboards to distribute merchandise is against the public policy of the United States and that such use induces and encourages the public to gamble. We argue that this contention is unsound and fallacious because all forms of gambling and the use of all gambling devices are just as much against the public policy of United States as is the use of punchboards and the use of other gambling devices induce and encourage the public to gamble even more than does the use of punchboards. Therefore, there is no reason to single out punchboards.

We argue that there cannot be a federal public policy in relation to an intrastate transaction.

We argue that this case is contrary to and in conflict with the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349 (a case wherein the Supreme Court affirmed a decision of this Court).

Petitioners, further, contend that the case at bar is contrary to the case of *U.S.* v. *Perry Halseth*, 342 U. S. 277.

CONTESTED ISSUE.

The contested issue is, are the findings of fact sufficient to sustain the order?

PROPOSITIONS OF LAW.

I.

The Commission does not have jurisdiction to issue a cease and desist order restraining the interstate shipping of punchboards, neither on the ground that the use of said devices when used to distribute merchandise in intrastate commerce is against the public policy of the United States nor that it induces and encourages the public to gamble.

II.

That this case is contrary to and in conflict with the case of Federal Trade Commission v. Bunte Bros. Inc., 312 U.S. 349.

III.

That this case is in conflict with the case of U. S. v. Perry Halseth, 342 U.S. 277.

IV.

That there cannot be a federal public policy as to an intrastate transaction.

ARGUMENT.

The Findings of Fact are not sufficient to sustain the Order.

Our position will be made clearer if we call the Court's attention to the following two allegations in the complaint upon which the Commission did not introduce evidence and did not make findings of facts upon:

> "Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices."

and

> "The respondents thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act."

These two allegations establish beyond doubt that the Commission in its complaint proceeded on the theory that the intrastate use of punchboards is an "unfair method of competition". However, the Commission abandons this theory in its findings, as there is no finding of competition, and of course no finding as to injury to competition.

The Supreme Court in the case of *F. T. C.* v. *Raladam*, 283 U.S. 643, established the law to be that there must be three factors in an unfair method of competition (1)

there must be competition, (2) an unfair practice within that competition, and (3) the unfair practice must be injurious to that competition.

The absence of findings of facts on these allegations distinguish the case at bar from all of the cases quoted from in the Commission's opinion (a. 7). In every case relied upon by the Commission in its opinion (a. 7) there were findings supporting these allegations. As the finding of facts in those cases were different than the finding of facts in the present case those cases are not in point. To support this point we cite the case of *J. C. Martin Corporation et al.* v. *Federal Trade Commission,* 242 F. 2d 530 at page 533, wherein this Court said:

> "Since there is no finding here concerning the relative values of petitioners' merchandise, the *Wolf* case is not controlling."

The Commission having abandoned the theory of its complaint adopts in its findings a theory that is set out in a case cited in the Commission's opinion (a. 7), but there is no quotation from it. In this case, *Feitler* v. *F. T. C.,* 201 F. 2d 790, the Court said page 793:

> "We agree that the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices. *Lichtenstein* v. *Federal Trade Commission, supra.* But the jurisdiction of the Commission in this case does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gambling devices, are used as a *means of selling or distributing merchandise* which is opposed to the public policy of the United States. This was made abundantly plain in the *Lichtenstein* case, *supra.* It

> is the fact that the interstate shipment of these devices facilitates *a kind of merchandising* which induces and encourages the public to gamble which makes such shipment an "unfair trade practice." Proof that the use of punch boards in the gambling disposition of merchandise has no effect upon trade in the same kinds of merchandise by other means could not have affected the question of the Commission's jurisdiction."

Petitioners contend that it is illogical and unsound to hold as the Court did in the above quotation that on the one hand the Commission does not have authority over interstate shipping of gambling devices as such, but on the other hand that it does have authority over the interstate shipping of punchboards which are used to distribute merchandise in intrastate commerce because such use is against the public policy of the United States and induces and encourages the public to gamble.

It certainly cannot be denied that all gambling devices are as much against the public policy of the United States as are punchboards, and in addition other gambling devices induce and encourage the public to gamble far more than does the use of punchboards. Therefore, it cannot logically be held that Congress intended to give the Commission jurisdiction over the interstate shipment of punchboards on the sole grounds that their use is against the public policy of the United States and induces and encourages the public to gamble, when it did not give authority over the interstate shipment of gambling devices as such.

The order is in conflict with the case of F.T.C. v. Bunte Bros. Inc., 312 U.S. 349.

The Supreme Court in the case of *F.T.C.* v. *Bunte Bros. Inc.*, 312 U.S. 349, (affirming a decision of this Court) held

that the Federal Trade Commission does not have jurisdiction over intrastate transactions.

At this point it must be borne in mind that the operation of punchboards to distribute merchandise is always an *intrastate* transaction.

The Commission is proceeding on the theory that the acts complained of herein are "unfair acts" in interstate commerce. In construing the words "unfair acts" as used in the Federal Trade Commission statute the holding in the *Bunte* case (page 7 herein) must be the basis upon which the construction of the statute must be predicated. Therefore, in construing the statute we must start with the fact that the Supreme Court has held that Congress did not give the Commission jurisdiction over the intrastate use of punchboards, in other words, Congress did not feel that the intrastate use of punchboards is of such an injurious nature as to be brought within the corrective action of the Commission. Notwithstanding this, the Ninth Circuit in the *Feitler* case (p. 6 herein) held that Congress did give the Commission jurisdiction over the act of furnishing the punchboards which are used in these intrastate acts. As Congress did not give the Commission authority over the act of using the punchboards it cannot logically be held that Congress intended to give authority over the act of just furnishing the punchboard.

The order is contrary to the case of U. S. v. Perry Halseth, 342 U.S. 277.

The Supreme Court in this case held that the shipping of punchboards in interstate commerce did not violate any Federal Statute. Without a finding that the use of punchboards to distribute merchandise has an unfair effect on competition the order herein is contrary to this case.

There Cannot Be a Federal Public Policy in Relation to Intrastate Transactions Which Transactions Have No Direct Effect Upon Interstate Commerce.

The Trial Examiner rested the entire decision upon the erroneous holding that the Commission's jurisdiction rested upon the sole fact that the intrastate use of punch boards to distribute merchandise is against the public policy of the Government of the United States.

Under our dual system of government as established by the constitution of the United States it is impossible to have a Federal public policy concerning intrastate transactions which do not have any effect upon interstate commerce. Such a policy would be a clear and unjustifiable encroachment by the Federal Government upon the sovereign rights of the states and would be clearly in direct conflict with the Tenth Amendment. Such a rule of law would clearly be in conflict with the admonition set out in the case of *Keller* v. *U. S.*, 213 U.S. 138, 149;

> "To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

Let us first have a clear and complete understanding of the law of public policy. The following from the case of *Julien* v. *Model Building, Loan & Investment Co.*, 92 N. W. 561, 565, 116 Wis. 79, 61 L.R.A. 668 is the clearest explanation of this point that we have found. The Court in this case at page 565 said,

> "It is the province of the statesman and not of the lawyer to discuss, and of the *Legislature to determine*,

> *what is best for the public good*, and to provide for it by proper enactments. It is the province of the judge to expound the law, *to declare public policy as he finds it in the unwritten and written law.* Public policy is a proper ground for a decision only in the sense of the policy of the law, *not in the sense of mere judicial notions as to what is best for the public good*". (Emphasis supplied)

The Court in the case of *Building Service Employees International Union, Local 262 et al.* v. *Gazzam*, 339 U. S. 532, at 537 & 538 said,

> "The public policy of any state is to be found in its constitution, acts of the Legislature, and decisions of its courts. Primarily it is for the lawmakers to determine the public policy of the State, *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353."

In following this discussion it is vital that we bear in mind that the practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery, is always an intrastate transaction. This fact is admitted, there is absolutely no question about it.

It is important to note that the 9th Circuit Court in announcing that the practice of selling goods by the use of a game of chance is contrary to the established public policy of the Government of the United States, did not refer to any provision of the Constitution or any enactment of Congress. It appears that the Court just announced the rule without having any legislative enactment upon the subject, or higher judicial precedent.

Therefore, let us discuss the limits of the power of the court with regard to the establishment of public policy. From the above quotations it is self-evident that the courts do not have the power to create, initiate or legislate a principle of public policy; their power is strictly limited to

declaring public policy as it exists in the law of the forum in which the court has jurisdiction. That is to say, that the Federal Courts do not have power to declare a Federal public policy, their authority is limited to announcing the Federal Public Policy as is found either in the Constitution or a constitutional enactment of Congress. If the Court's power is not confined within these limits the courts would be exercising clearly a legislative function which certainly would be in direct violation of the Constitution's division of the Legislative, Judicial and Executive functions. As the judiciary does not have power to create a federal public policy concerning intrastate transactions the next questions are, first, does the constitution declare a public policy towards the intrastate use of chance to distribute merchandise? (2) Has Congress passed a constitutional enactment declaring such a public policy? (3) Would Congress have the power to pass such an act, with regards to such intrastate transactions?

If there is to be found in the Constitution that such a practice is contrary to the public policy of the Federal Government, the law must be that by virtue of the Constitution the common law is made a part of and incorporated into Federal Law. In other words, if the common law is not a part of the Federal Law, then the Constitution does not contain any pronouncement that intrastate transactions are contrary to a Federal Public Policy.

The law is settled beyond controversy that the Constitution does not incorporate the common law as a part of the Federal Law. On this point the Court in the case of *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64, at 78:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be

> local in their nature or general, * * *. And no clause in the constitution purports to confer such a power upon the Federal Courts."

In the same case at page 79 the court says that there cannot be a rule of law "that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute". The court therein emphasizes the fact that courts do not have "the power to use their judgment as to what the rules of common law are". The court then goes on and says,

> "But the law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else * * * The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

In this connection it is well to consider the case of *Keller* v. *U. S.*, 213 U.S. 138. This case involved an enactment by Congress declaring it a crime for anyone to harbor an alien prostitute. Certainly if any acts which are exclusively intrastate should be declared against the Federal public policies, prostitution should, if it does not lead the list, it should be among the very top. However, the court held the act unconstitutional and in doing so at page 148 said,

> "That there is a moral consideration in the special facts of this case, that the act charged as within the scope of the police power, is immaterial, for, as stated,

there is in the Constitution no grant to Congress of the police power".

And at 149 said,

> "To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White,* 7 Wall, 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

In connection with Congress' power over intrastate transactions, the Supreme Court said in the case of *U. S.* v. *Vassar,* 72 U.S. 462 and 471,

> "Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the constitution except such as is strictly incidental to the exercise of powers clearly granted to the Legislature".

In the case of *Carter* v. *Carter Coal Co.,* 298 U.S. 238 at 295, the court said,

> "The preservation of the states and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. * * * Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal government in the direction of taking over the powers of the states is that the end of the journey may find the states despoiled of their powers * * *".

And the Court says at pages 291 and 292,

> 'The proposition, often advanced and as often discredited, that the power of the Federal Government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.''

To hold that such a practice is contrary to the Federal public policy, is contrary to the case of *U. S.* v. *Halseth,* 342 U.S. 277. This case involved the question of shipping punch boards in interstate commerce which were to be used to distribute merchandise in intrastate commerce. The court held that such conduct did not violate any Federal Law whatsoever. This case clearly established that Congress has never and never intended to pass an act declaring that the intrastate use of chance to distribute merchandise is against the public policy of the Government of the United States.

From the above and foregoing it is established that the Federal Courts, that is the Judicial Branch of the Federal Government, does not have authority or power to establish, create initiate, or formulate a Federal public policy concerning the use of chance to distribute merchandise in intrastate commerce; it is, also, established that the Constitution does not contain such a public policy, that Congress has not declared one and that Congress does not have the power to do so.

Therefore, it is self-evident that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, is not contrary to the established public policy of the United States.

CONCLUSION.

In conclusion, for the reasons hereinabove stated petitioners respectfully urge that this Court set aside the "cease and desist" order of the Commission entered herein.

Respectfully submitted,

MARVIN H. RUTTENBERG
Attorney for Petitioners

INDEX TO APPENDIX

	PAGE
Order (Tr. 65)	14a
Findings of Fact (Tr. 38)	14a
Petition for Review	1a
Initial Decision (Tr. 38)	4a
Docket Entries	1a

APPENDIX.

Docket Entries

The complaint issue on the 10th day of January, 1956 (Tr. 1); Answer filed February 17, 1956 (Tr. 8); hearings were held; The Trial Examiner's "Initial Decision" was filed January 31, 1957 (Tr. 38); Appeal to Commission March 6 (Tr. 43); Commission's ruling on Appeal June 4, 1957 (Tr. 67).

PETITION FOR REVIEW OF AN ORDER TO CEASE AND DESIST
(Filed Aug 9 1957)

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

* * (Caption—No. 12106) * *

To the United States Court of Appeals for the Seventh Circuit and to the Honorable Judges of said Court.

Your petitioners, R. B. James and Patrick Zurla, respectfully represent:

1. That your petitioners are co-partners and are doing business under the name of Chicago Board Company.

The Nature Of The Proceedings

2. That on January 10, 1956, the Federal Trade Commission caused its complaint (Docket No. 6482) to be issued against your petitioners, attempting to allege the use of unfair methods of competition, unfair acts, and practices in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 25th, 1914; as amended March 21st, 1938, entitled "An Act to Create a Federal Trade Commission,

to define its powers and duties, and for other purposes"; the answer to said complaint was filed thereafter by your petitioners in said proceedings;

That on June 12th, 1957, the Federal Trade Commission served its report and its purported findings as to the facts and conclusions of law and its purported order to cease and desist against your petitioners, which order is in substance as follows:

> "It is ordered that respondents R. (Ruby); B. James and Patrick Zurla, individuals and co-partners, trading as Chicago Board Company or under any other trade name or names, their representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:
>
> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushboards, punch cards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

This proceeding is brought to have said order reviewed and set aside.

The Facts And Statutes Upon Which Venue Is Based

3. The Federal Trade Commissioin Act, (section 45, title 15, U.S.C.A.) provides that any person required by an order of the Federal Trade Commission to cease and desist from using methods of competition, unfair acts or practices, may obtain a review of such order by filing a petition in any circuit court of appeals of the United States within any circuit where the method of competition, unfair or deceptive acts or practices in question were used or where such person resides or carries on said business.

Your petitioners' principal place of business is in the City of Chicago, County of Cook, State of Illinois, and

that now and at all times herein mentioned have been carrying on said business in the City, County and State aforesaid and within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

Grounds On Which Relief Is Sought

4.

(1) The facts alleged in the complaint on file herein are not sufficient to give the Commission jurisdiction to issue a cease and desist order against Petitioners.

(2) The acts and practices of the Petitioners are not a violation of the Federal Trade Commission Act.

(3) The finding of facts are not sufficient to support the order.

(4) The proceeding is not to the interest of the public as required by the Federal Trade Commission Act.

(5) The order to cease and desist is contrary to and against law.

Your petitioners, believing themselves aggrieved by said cease and desist order of the respondent and considering it unauthorized, erroneous, void, and unlawfully prejudicial to your petitioners, and your petitioners being without remedy in the promises except in this court as by statute in such cases made and provided, hereby petition for a review of said order of the commission by this Honorable Court.

Prayer For Relief

5. Your petitioners pray that this Honorable Court review the findings and order of the Federal Trade Commission in said cause and enter a decree in this Honorable Court setting aside the order of the Federal Trade Commission entered herein against your petitioners.

Patrick Zurla
R. B. James
Petitioners

Marvin M. Ruttenberg
33 N. LaSalle St.
Chicago, Illinois
Attorney for Petitioners

County of Cook
State of Illinois

R. B. James and Patrick Zurla depose and say that they are the petitioners above named, that they have read the above and foregoing petition, and that the same is true to their best knowledge and belief.

Patrick Zurla
R. B. James

Subscribed and sworn to before me on this the 8th day of August, 1957.

Mildred A. Ruben
Notary Public

INITIAL DECISION OF THE TRIAL EXAMINER.

1. Respondents R. (Ruby) B. James and Patrick Zurla are individuals and co-partners trading and doing business as Chicago Board Company, with their office and principal place of business located at 2352 West Cermak Avenue, Chicago, Illiinois.

2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution, in commerce, to manufacturers of and dealers in various articles of merchandise, of devices commonly known as pushcards and punchboards. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various states of the United States other than Illinois, and in the District of Columbia. There is now and has been for

more than two years last past a substantial course of trade in such devices by said respondents. In 1954 and 1955 respondents' sales amounted to approximately $500,000 annually. The pushcards and punchboards are so designed, prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, though varying in detail, involve the same features of chance or lottery.

3. Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance.

Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sale and distribution of merchandise.

4. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public.

5. Controlling decisions have now well settled that the practice of selling goods by a plan or method involving the use of a game of chance or lottery is contrary to the established public policy of the Government of the United States, and in violation of the Federal Trade Commission Act; that selling in interstate commerce a means or instrumentality by which merchandise can or may be sold by lotteries or games of chance is an unfair method of competition; and that placing in the hands of others the means of engaging in such acts or practices is likewise contrary to public interest and public policy.

Conclusions

This proceeding is in the public interest.

The acts and practices of respondents, as hereinabove described, are all to the prejudice and injury of the

public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Therefore,

It Is Ordered that respondents R. (Ruby) B. James and Patrick Zurla, individuals and co-partners, trading as Chicago Board Company or under any other trade name or names, their representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

/s/ J. Earl Cox
J. Earl Cox,
Hearing Examiner.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

The complaint charges respondents with having violated the Federal Trade Commission Act by the sale and distribution in commerce of punchboards and pushcards used and for use in selling and distributing merchandise by lottery or chance. At the conclusion of the hearings, which consisted of testimony and exhibits offered by counsel for the complaint and of stipulations entered into between the parties, the hearing examiner issued an order directing respondents to cease and desist from:

> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

The facts are not in dispute. Respondents' general method of operation is set out in Paragraph 2, 3 and 4 of the initial decision which are as follows:

"2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution, in commerce, to manufacturers of and dealers in various articles of merchandise, of devices commonly known as pushcards and punchboards. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various states of the United States other than Illinois, and in the District of Columbia. There is now and has been for more than two years last past a substantial course of trade in such devices by said respondents. In 1954 and 1955 respondents' sales amounted to approximately $500,000 annually. The pushcards and punchboards are so designed, prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, though varying in detail, involve the same features of chance or lottery.

"3. Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and

the push or punch completed. Certain specified numbers entitle purchasers to desiginated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance. Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sale and distribution of merchandise.

"4. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public."

Paragraph 5 of the initial decision is as follows:

"5. Controlling decisions have now well settled that the practice of selling goods by a plan or method involving the use of a game of chance or lottery is contrary to the established public policy of the Government of the United States, and in violation of the Federal Trade Commission Act; that selling in interstate commerce a means or instrumentality by which

> merchandise can or may be sold by lotteries or games of chance is an unfair method of competition; and that placing in the hands of others the means of engaging in such acts or practices is likewise contrary to public interest and public policy."

Respondents' appeal claims, first, that Paragraph 5 is not a finding of fact but a legal conclusion and should be stricken, and, second, that the initial decision is not supported by the findings.

It is true that Paragraph 5 contains conclusions of law which the hearing examiner deemed applicable to the factual findings made in Paragraphs 1 to 4, both inclusive. The location of Paragraph 5 in the initial decision in no way interferes with the findings of fact in the preceding paragraphs and offers no justification for striking it from the record. The findings of fact made by the hearing examiner are clearly supported by the greater weight of the evidence and from a consideration of the entire record are adopted as the findings of the Commission.

The law covering the matters involved herein is well settled and does not require an extensive discussion here. Section 5(a)(1) provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

In *F.T.C.* v. *R. F. Keppel & Bro., Inc.* (1934) 291 U. S. 304, the Court commented on the broad and flexible character of the phrase "unfair methods of competition", which was the basis of Section 5. Since then the law has been further broadened to include unfair and deceptive acts or practices. Although the Commission found in the *Keppel* case that the methods of respondents (selling candy by chance or a lottery) resulted in a substantial diversion of trade from other manufacturers of candy, nevertheless, the Court put the decision on the broad ground expressed as follows:

> "Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."

This conclusion has been consistently followed by the Courts. In *Wolf* v. *F. T. C.* (1943) 135 F. 2d 564, the Court held that the use of a game of chance for the distribution of merchandise is an unfair act or practice in commerce. In answer to respondent's argument that there was no proof of injury to competition, the Court called attention to the 1938 amendment of the Federal Trade Commission Act:

> "to broaden the scope of the jurisdiction of the Commission to enable it to proceed against any person using an unfair or deceptive act or practice in commerce as well as an unfair method of competition, provided it appears to the Commission that such proceeding would be in the public interest (15 U.S.C.A. sec. 45). Hence it is no longer necessary to show competition, if there is an act or practice in commerce, inimical to the public interest. (*Scientific Mfg. Co.* v. *Federal Trade Commission*, 124 F. (2d) 640 (34 F. T. C. 1793); *Pep Boys* v. *Federal Trade Commission*, 122 F. (2d) 158 (33 F. T. C. 1807)). See also *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149 (34 F. T. C. 1843). We think the practice here employed is contrary to the public interest, and that a proceeding to prevent its further use is in the public interest."

A similar conclusion was reached in *Globe Cardboard Novelty Company, Inc.* v. *F. T. C.* (1941) 1952 F. 2d 444.

In *Modernistic Candies, Inc.* v. *F. T. C.* (1944) 145 F. 2d 454, the Court held that the selling and distribution in commerce of a punchboard designed, intended and conducive to gambling violated the Federal Trade Commission

Act even though the prizes were added by the purchaser of the board. Other cases which have passed on the various questions involved here are *Jaffe* v. *F. T. C.*, 139 F. 2d 112, *Charles A. Brewer & Sons* v. *F. T. C.*, 158 F. 2d 78, *Lichtenstein, et al.* v. *F. T. C.* 194 F. 2d 607.

Respondents next argue that "There cannot be a federal public policy in relation to intrastate transactions which transactions have no direct effect upon interstate commerce." The order of the hearing examiner simply prohibits the selling and distribution in interstate commerce of pushcards, punchboards or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme. It is true that the payment of the consideration for the chance, and the distribution of the prizes, all take place within some state and are subject to such laws as that state may have concerning gambling and lotteries. With that part of the transaction the order is not concerned. In speaking of a similar situation the Court, in *Lichtenstein, et al.* v. *F. T. C., supra,* had this to say:

> "Nowhere has the Commission claimed the power to prohibit the transmission of such lottery devices in interstate commerce as such. The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444 (Cir. 3) [48 F. T. C. 1725] is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3) [34 F.T.C. 1793, 3 S. & D. 430] made it clear that trade practices were the sole concern of the Commission."

See also *Feitler* v. *F. T. C.* (1953) 201 F. 2d 790.

The exercise of the Commission's powers in this limited area does not depend upon state laws against gam-

bling. There is no conflict here between federal and state powers.

Respondents finally argue that the public policy of the United States can be laid down only in the Federal Constitution or in a law duly enacted by the Congress.

In *Modernistic Candies, Inc.* v. *F. T. C., supra,* the Court said:

> "'The public policy of a state is to be found embodied in its constitution and its statutes, and, when these are silent on the subject, in the decisions of its courts.' *The Illinois Bankers Life Association* v. *Collins,* 341 Ill. 548, 551, 173 N. E. 465. Recently, we said in *Maltz* v. *Sax,* 134 F. (2d) 2, 4, 'Moreover, in the absence of any statute condemning gambling as illegal, the Federal courts have consistently condemned it as against public policy.' We have also held that those who aid and abet such a method of merchandising, those *participes criminis* with gamblers and their schemes, are likewise engaged in unfair trade practices contrary to public policy. *Jaffe* v. *Federal Trade Commission,* 139 F. (2d) 112 [37 F. T. C. 816; 3 S. & D. 610]; *Koolish* v. *Federal Trade Commission,* 129 F. (2d) 64 [34 F. T. C. 1863; 3 S. & D. 492]; *Maltz* v. *Sax, supra.*"

U.S.C.A. Title 15, Chapter 24 forbids the transportation in interstate commerce of "gambling devices" as defined in said law. An exception is made, however, in the case of shipments to any place in any state which has enacted a law providing for exemption from this law. The law further provides in Section 2 that:

> "Nothing in this act shall be construed to interfere with or reduce the authority or existing interpretations of the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U.S.C. 41-58)."

Report No. 2769, 81st Congress, 2d Sess., pages 9-10, filed by the House Committee on Interstate and Foreign Commerce states:

"Section 2 further provides that nothing in this act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commisson Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the purpose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended."

It thus clearly appears that both the Congress and the Federal Courts have concluded that it is contrary to the public policy of the United States to permit the shipment in commerce of punchboards and pushcards which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission. Respondents' appeal is denied and it is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision herein.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Bee Jay Products, Inc. v. *Federal Trade Commission*, 204 F. 2d 272, certiorari denied, *sub nom. Universal Mfg. Co.* v. *Federal Trade Commission*, 346 U.S. 856	4
Bork Mfg. Co. v. *Federal Trade Commission*, 194 F. 2d 611	4
Charles A. Brewer & Sons v. *Federal Trade Commission*, 158 F. 2d 74	4
Consolidated Mfg. Co. v. *Federal Trade Commission*, 199 F. 2d 417	4
Federal Trade Commission v. *Bunte Brothers*, 312 U.S. 349	5
Federal Trade Commission v. *R. F. Keppel and Bro.*, 291 U.S. 304	4
Feitler v. *Federal Trade Commission*, 201 F. 2d 790	4
Gay Games v. *Federal Trade Commission*, 204 F. 2d 197	4
Globe Cardboard Novelty Co. v. *Federal Trade Commission*, 192 F. 2d 444	4
Halseth v. *Federal Trade Commission*, C.A. 7, No. 11,022, September 15, 1954, certiorari denied, 348 U.S. 928	4
Hamilton Mfg. Co. v. *Federal Trade Commission*, 194 F. 2d 346	4
Lichtenstein v. *Federal Trade Commission*, 194 F. 2d 607, certiorari denied, 344 U.S. 819	4
Seymour Sales Co. v. *Federal Trade Commission*, 216 F. 2d 633, certiorari denied, 348 U.S. 928	4
U.S. Printing & Novelty Co. v. *Federal Trade Commission*, 204 F. 2d 737, certiorari denied, 346 U.S. 830	4
Zitserman v. *Federal Trade Commission*, 200 F. 2d 519	4, 5

Statutes:

Page

Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, Section 5 ..... 2, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 133

R. B. JAMES, ET AL., PETITIONERS,

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 2a-5a) is reported at 253 F. 2d 78.

JURISDICTION

The judgment of the court of appeals (Pet. 1a-2a) was entered on February 7, 1958, a petition for rehearing was denied on March 31, 1958 (Pet. 5a), and the final order enforcing the Commission's cease-and-desist order was entered on April 7, 1958 (Pet. 5a-7a). The petition for a writ of certiorari was filed on June 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the interstate sale and distribution of punchboards and pushcards used for selling merchandise by lot or chance is an unfair act or practice under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In January 1956, the Federal Trade Commission issued a complaint charging petitioners with unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U.S.C. 45), by sale and distribution in interstate commerce of punchboards and pushcards for use in selling merchandise by lottery or chance (App. 7a).[1] After hearing, the Commission held that petitioners had violated the act and issued a cease-and-desist order, which the court of appeals unanimously affirmed and enforced.

The Commission made the following findings of fact:

---

[1] "App." refers to the Appendix to respondent's brief in the court of appeals.

Petitioners sell and distribute in interstate commerce devices known as pushcards and punchboards, designed for use by retail dealers in selling merchandise to the public by a game of chance (App. 4a-5a). In 1954 and 1955, petitioners' annual sales were roughly $500,000 (App. 5a).

The various types of punchboards and pushcards sold by petitioners differ in detail, but all "involve the same feature of chance or lottery." (App. 5a.) Upon the payment of a specified amount, the purchaser is entitled to one punch or push from the punchboard or pushcard. A number, previously concealed, is thereupon disclosed. A purchaser who picks a winning number receives an article of merchandise, without additional cost, at a price which is substantially less than the normal retail price of such article; purchasers who do not select a lucky number receive no merchandise. Articles of merchandise are thus distributed to the public wholly by lot or chance (App. 5a).

Many business enterprises which sell and distribute merchandise in interstate commerce have purchased petitioners' punchboards and pushcards, have packaged assortments consisting of merchandise and petitioners' devices, and have vended such assortments to retailers for resale to the public (App. 6a).

The Commission ordered petitioners to cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public

by means of a game of chance, gift enterprise or lottery scheme [App. 7a].

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no occasion for further review by this Court. It rests upon the long settled rule that the Commission may prevent the interstate distribution of gambling devices used for marketing merchandise. In *Federal Trade Commission* v. *R. F. Keppel and Bro.*, 291 U.S. 304, this Court unanimously held that it was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act to distribute in interstate commerce penny candy assortments, where the resale price depended upon chance. Commission orders prohibiting the interstate distribution of punchboards and pushcards have been sustained by courts of appeals in every circuit in which their validity has been litigated, and this Court has consistently refused to review such decisions.[2]

---

[2] Among the more recent cases are *Seymour Sales Co.* v. *Federal Trade Commission*, 216 F. 2d 633 (C.A.D.C.), certiorari denied, 348 U.S. 928; *U.S. Printing & Novelty Co.* v. *Federal Trade Commission*, 204 F. 2d 737 (C.A.D.C.), certiorari denied, 346 U.S. 830; *Halseth* v. *Federal Trade Commission*, C.A. 7, No. 11,022, September 15, 1954, certiorari denied, 348 U.S. 928; *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (C.A. 9), certiorari denied, 346 U.S. 814; *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C.A. 9), certiorari denied, 344 U.S. 819; *Bee Jay Products, Inc.* v. *Federal Trade Commission*, 204 F. 2d 272 (C.A. 10), certiorari denied, *sub nom. Universal Mfg. Co.* v. *Federal Trade Commission*, 346 U.S. 856. See also *Hamilton Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C.A.D.C.); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F. 2d 444 (C.A. 3); *Consolidated Mfg. Co.* v. *Federal Trade Commission*, 199 F. 2d 417 (C.A. 4); *Charles A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C.A. 6); *Zitserman*

Petitioners' sole contention (Pet. 3-4)—that the ruling of the court of appeals is in conflict with this Court's decision in *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349—is without merit. In that case, the Court held that the Commission's power under Section 5 is limited to practices employed "in" interstate commerce, and does not authorize the Commission to forbid the exclusively intrastate marketing of products by means of a gambling device. Since petitioners admittedly "sell punchboards and pushcards in interstate commerce * * *" (Pet. 3), the *Bunte Brothers* case is, as the court of appeals pointed out (Pet. 4a), "inapposite." See *Zitserman* v. *Federal Trade Commission,* 200 F. 2d 519, 523 (C.A. 8), and cases there cited.

---

v. *Federal Trade Commission,* 200 F. 2d 519 (C.A. 8); *Bork Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 611 (C.A. 9); *Gay Games* v. *Federal Trade Commission,* 204 F. 2d 197 (C.A. 10).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

ERNEST L. FOLK, III,
Attorney.

EARL W. KINTNER,
General Counsel,

JAMES E. CORKEY,
Assistant General Counsel,

Federal Trade Commission.

JULY, 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 473687 - 58

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 133

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING.

THOMAS J. PEARSON,
927 15th Street N.W.,
Washington, D.C.,
Attorney for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1958.

No. 133

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

PETITION FOR REHEARING.

This petition is based upon the ground that the opinion in the Court below is contrary to and in conflict with this Court's holding in the case of *U. S.* v. *Halseth*, 342 U.S. 277.

Petitioners in their brief herein in support of their petition for a writ of certiorari and in their reply brief herein relied primarily on the point that the decision in the United States Court of Appeals in the Seventh Circuit herein is in direct conflict with this Court's holding in the case of *F. T. C.* v. *Bunte Brothers,* 312 U. S. 349.

Petitioners now as a basis for the granting of the writ of certiorari present the following grounds which is available to them and which was not presented heretofore because of petitioners' faith in the correctness of their other contention.

The Court below predicated its opinion on the following quotation; from the opinion:

> "Overlooking, when not denying, Congressionally authorized Commission functions and aims, these petitioners, in substance, claim an unrestricted right to use interstate commerce channels for flooding the states with punch-boards. Because petitioners themselves do not participate in the ultimate sales of punches over store counters to individual consumers within a state, petitioners ask for immunization from §5(a)(1). To describe their position posits the refutation of it. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483 (1922)."

This Court in the case of *U. S.* v. *Halseth,* 342 U.S. 277 held that the interstate shipment of punchboards is not prohibited. Congress has never felt that the interstate shipment of punchboards should be restricted.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to it for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

THOMAS J. PEARSON
Attorney for Petitioners

CERTIFICATE.

Comes now the undersigned, the attorney for the petitioners herein, and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that this Petition is restricted to a ground available to the petitioners although not previously presented.

THOMAS J. PEARSON